ADMISSION TO AND CONTROL OF PRACTICE BEFORE FEDERAL ADMINISTRATIVE AGENCIES

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It was said by Chief Justice Hughes, in 1916, that the distinctive legal development of this era is that our activities are largely controlled by federal or state administrative agencies and that as a result a host of controversies as to private rights are no longer decided in courts.[1] In the same year, Elihu Root, then President of the American Bar Association, stated that we were entering upon the creation of a body of administrative law different in its machinery, its remedies, and its safeguards from the old methods of regulation by specific statutes enforced by the courts.[2]

During the period which has intervened since these prophetic statements were made, government by administrative agency has come to be an accomplished fact. Indeed, the end to administrative multiplication cannot be foretold. Witness the current activity in Congress with respect to creation of a "space agency"—a development which prior to recent experiments with man-made earth satellites would scarcely have received general public attention.

It is not to be expected that persons having business with agencies of the Government should be compelled to appear in person without the assistance of legal representatives or others possessed of requisite representational skills. Representatives of those whose rights may be affected by agency action should be reliable and competent. The Government as well has an interest in the integrity and ability of adversary representatives. Moreover, qualified persons who wish to represent others have a legitimate interest in the formalities and restrictions imposed upon representatives.

RECOGNITION OF LAWYERS

Only four of the departments and other administrative agencies of the federal government require that attorneys-at-law desiring to represent others before the respective departments or agencies file applications for admission to practice.[3] Two of the four (Treasury Department and Veterans' Administration) require no documentary or other

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† The views herein expressed are not necessarily the views of the Department of Justice.

[1] Waterman; *Federal Administrative Bars: Admission and Disbarment,* 3 U. OF CHI. L. REV. 261 (1936).

[2] Presidential Address, 41 A.B.A. REP. 355, 368 (1916).

[3] Interstate Commerce Commission, 49 C.F.R. §1.7-.13 (1949); Patent Office (in patent cases only), 37 C.F.R. §1.341-.348 (1949); Treasury Department, 31 C.F.R., §10.1-.13 (1949); Veterans' Administration (in prosecution of claims) 38 C.F.R. §14.629 (1956).

support of an attorney's application. The Interstate Commerce Commission requires that the application be supported by the certificate of the clerk of the court before which the attorney is admitted to practice. Only the Patent Office—since 1934—requires the passing of an examination by attorneys desiring to practice before it in patent cases. And only the Treasury Department regularly investigates attorney applicants.

The other administrative agencies, some thirty of which conduct adversary administrative proceedings, have not found it necessary to adopt formal procedures for admission of lawyers. A question thus arises as to whether formal admission procedures best serve the public interest.

Every lawyer must be admitted to the bar of some state, territory, possession, or the District of Columbia.[4] He is admitted upon a showing that he is of good moral character, that he has formal educational requisites, and after rigorous examination as to his knowledge of the law. He subscribes to an oath of admission and a code of ethics. He is subject to investigation prior to admission, and to continuous surveillance by bench, bar, and public after admission.

All these admission requirements are usually administered by and under supervision of one or more courts, and they may be said to afford a reasonable degree of protection to the public when applied to administrative practice. Many agencies which have no formal admission procedures rely entirely upon state admission procedures through rules which permit any person admitted to practice by a state to practice before the agency. Indeed, even those agencies which prescribe formal admissions similarly rely, for not only is admission based purely upon a showing of bar membership in good standing,[5] but discipline likewise is in practice left primarily to the courts and to the organized bar.[6]

While virtually all agencies have rules governing the conduct of lawyers and some twenty agencies have made provision for disbarring, enjoining, suspending, or otherwise disciplining lawyers who practice before them,[7] rare indeed is the administrative disciplinary proceeding.[8]

Recognition of Non-Lawyers[9]

Formal applications by non-lawyers for admission to practice are required by seven civilian agencies:[10]

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[4] Courts in the District of Columbia, the territories and possessions, are United States courts, and they may initially admit persons to practice as attorneys.

[5] Except in the Treasury Department and the Patent Office.

[6] Disciplinary jurisdiction over a practicing attorney need not be predicated upon formal admission. It can be based upon acts of practicing.

[7] Table I following text of this article.

[8] See VOM BAUR, STANDARDS FOR ADMISSION FOR PRACTICE BEFORE FEDERAL ADMINISTRATIVE AGENCIES, C. IV B (1953).

[9] The term "non-lawyers" appears preferable to "laymen." Every professional group identifies a non-member of the group as a "layman."

[10] The Tax Court admits non-lawyers upon examination. However, the Tax Court is not treated in this article, since it is for all practical purposes a judicial

Federal Maritime Board	46 C.F.R. §201.26 (1953).
GAO	4 C.F.R. §1.4 (1949).
ICC	49 C.F.R. §1.8(b) (1949).
Interior	43 C.F.R. §1(b) (1954).
Patent Office	37 C.F.R. §1.341(b), §2.12(b) (1949).
Treasury	31 C.F.R. §10.3(a) (i) (ii), §10.3(j) (1949).
Veterans Administration	38 C.F.R. §14.629 (1956).

These agencies require the giving of rather extensive information, statements of experience, references, etc. They, plus the United States Tariff Commission,[11] are the only civilian agencies which give consideration to the qualifications of non-lawyers before admitting them to practice. Eight military agencies consider the qualifications of non-lawyer representatives.[12]

A few agencies give examinations to non-lawyers. The Treasury Department admits certified public accountants without examination, but subjects other non-lawyers to examination as to character and competence.[13] Both the Interstate Commerce Commission[14] and the Patent Office (trademark cases)[15] require non-lawyers to pass examinations not required of lawyers.

Many administrative agencies permit non-lawyers to appear before them in a representative capacity.[16] Agencies which permit persons to represent others before them generally do not discriminate between lawyers and non-lawyers.[17] Perhaps illustrative are rules of the Federal Power Commission (party may appear in person or by attorney or other qualified representative),[18] Health, Education and Welfare (party may appear in person or by authorized representative)[19] and National Labor

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tribunal operating in the federal judicial system. Stern v. Commissioner, 215 F.2d 701, 707 (3d Cir. 1954). See 8 C.F.R. §292 (1958); 38 C.F.R. §14.627 (1956) for recognition of organizational representatives by Immigration and Naturalization Service and Veterans Administration.

11 19 C.F.R. §201.12(c) (1953).

12 VOM BAUR, *op. cit. supra* note 8.

13 31 C.F.R. §10.3(a) (i) (ii), §10.3(j) (1949); Kilpatrick, *Treasury Department Practice*, 15 FED. B.J. 132 (1955).

14 49 C.F.R. §1.8(b) (1949).

15 37 C.F.R. §100.42 (1949).

16 The Selective Service System *prohibits* lawyers appearing in a representative capacity before the local boards. "[N]o registrant may be represented before the local board by anyone acting as attorney or legal counsel." 32 C.F.R. §1624.1(b) (1954).

17 REPORT OF COMMITTEE ON ADMINISTRATIVE PRACTICE OF THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA, ADMISSION TO AND CONTROL OVER PRACTICE BEFORE FEDERAL ADMINISTRATIVE AGENCIES (1938).

18 18 C.F.R. §1.4 (1949).

19 21 C.F.R. §1.705 (1955).

Relations Board (party may appear in person, by counsel, or by other representative).[20]

In the case of non-lawyer representatives who may be subject to little or no standard of competence or character other than that which may be imposed by the agencies before which they practice, it may be incumbent upon the agencies to impose special requirements as to competence and character and special limitations relating to the scope of representative activity.

It would appear that the test for permitting any person to appear before a federal administrative agency should be in terms of the probability of his training and experience contributing to the resolution of issues. Of the non-lawyer in government contracting it has been said, "modern government contracting is so complex that no person should be permitted to hold himself out as an expert in the field unless he has the qualifications. Recognition of this principle does not disparage the non-lawyer specialist. It places him on a professional footing. But as a professional the public interest requires that he be not only of good moral character, but that he actually possess the necessary technical skill and an understanding of his professional responsibilities."[21]

Closely related to problems of permitting persons to be represented by another, but definitely different, are questions with respect to the discontinuance of that permission. Many agencies which impose no formal requirements on persons appearing before them in a representative capacity have rules providing for disbarring of such representatives in appropriate circumstances.

Provisions in agency rules for disbarring non-lawyers are comparable to those for lawyers except for conduct in which only a lawyer could engage; *e.g.*, being disbarred by a court.[22]

One problem that heretofore has received inadequate consideration relates to the extent to which disbarment of an individual before one administrative agency should affect his right to represent others before different agencies, or, in the case of a lawyer, also before courts. Table I reveals that disbarment by another administrative agency is a ground for disbarment of a lawyer before the Secretary of the Interior and the Board of Immigration Appeals and Immigration & Naturalization Service, and such disbarment automatically disbars one before the Post Office, yet no mechanism is provided by which other agencies are informed of disbarment before an agency. The rules of the General Accounting

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[20] 29 C.F.R. §102.38 (1949).

[21] Moss, *Practice Before Government Contracting Agencies,* 15 FED. B.J. 155, 165 (1955). For discussion of C.A.B. practice by non-lawyers, see DeSeife, *Practice of Layman Before Civil Aeronautics Board,* 15 FED. B.J. 168 (1955).

[22] See table at end of article. See also tables to VOM BAUR, *op. cit. supra* note 8.

Office formerly provided that other agencies would be notified of its disbarments.[23]

While some agencies have promulgated comprehensive standards of conduct for both lawyers and non-lawyer representatives, there is no uniform government-wide treatment of admission and control of practice by either lawyers or non-lawyers.

RECENT HISTORY OF CURRENT LEGISLATIVE PROPOSALS

Demands and suggestions for improved controls over administrative practice have not been lacking.[24] Almost twenty-five years ago the Special Committee on Administrative Law of the American Bar Association recommended that conditions on admission to practice before administrative tribunals should be harmonized and made generally applicable, the machinery for discipline and disbarment should be unified and strengthened, and high standards of professional conduct should be established and rigorously enforced.[25] In 1940, the American Bar Association sponsored a bill which would have centralized registration of administrative practitioners in the Department of Justice.[26] Bills designed to authorize any lawyer in good standing at the bar of the highest court of a state to appear before federal administrative agencies were repeatedly introduced in the Congress after 1940.[27] An amendment offered in the House of Representatives to the bill that became the Administrative Procedure Act,[28] was designed to permit lawyers in good standing at the bar of the highest court of a state to appear before federal administrative agencies without further formality. The proposed amendment was defeated, apparently, largely because the matter was believed to be more properly dealt with in a separate bill.[29].

Various study groups have commented upon different aspects of practice problems. The Attorney General's Committee on Administrative Procedure (1940) was critical of the "unjustifiable annoyance" to members of the bar in connection with their admission to practice before agencies, and suggested that an Office of Federal Administrative Procedure, if established, could usefully turn attention to the subject of administrative practice.[30]

Both the Commission on Organization of the Government (Hoover Commission) and its Task Force on Legal Services and Procedure considered admission and control of practice at some length. In title II

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[23] 4 C.F.R. §1.4(d) (1949).

[24] For excellent history of statutory provisions see VOM BAUR, *op. cit. supra* note 8.

[25] 59 A.B.A. REP. 539-540 (1934).

[26] 65 A.B.A. REP. 222-223 (1940).

[27] 92 CONG. REC. 5662 (1946).

[28] 60 STAT. 237 (1946), 5 U.S.C. §§1001-11 (1952).

[29] 92 CONG. REC. 5667-68 (1946).

[30] *Report of the Committee on Administrative Procedure,* S. Doc. No. 8, 77th Cong., 1st sess. 124 (1941).

of its Report[31] the Commission made a series of eight recommendations calculated to ensure a statutory right to representation by qualified persons operating under standards of conduct prescribed by statute. Under the recommendations no lawyer would be required to submit to formal admission procedures and no non-lawyer would be permitted to practice law. Discipline of lawyers would be by a federal grievance committee, acting through the United States district courts and by the agencies which would have authority to suspend for one year. Non-lawyer representatives would be subject to disciplinary control by the respective agencies.

These recommendations of the Hoover Commission generally reflected the views of the Task Force as those views were expressed at length in the Task Force Report[32] and were in turn reflected in legislative proposals sponsored by the American Bar Association. Ultimately, the Association sponsored a draft bill which became S. 932, 85th Cong., 1st sess.[33]

TITLE IV OF S. 932

S. 932, as does each of its identical companion bills,[34] consists of five titles in the aggregate comprising a bill to be known as the "Federal Administrative Practice Reorganization Act of 1957." Under title I there would be created an independent agency of government, to be known as the "Office of Federal Administrative Practice." The head of that office would be a director, who would also perform certain duties under title IV.

Title IV establishes the right of every participant before an administrative agency to be represented in any matter by an attorney at law or, in any matter which does not involve the practice of law, by a person specially authorized to practice before the agency. Unless otherwise provided by statute, no party to an agency hearing required to be determined on a record which is subject to judicial review would be represented except by an attorney at law.

Every attorney at law in good standing at the bar of the highest court of any state, territory, commonwealth, or possession of the United States or of the District of Columbia who had filed a certificate to that effect with the Director, Office of Federal Administrative Practice (created by title I) would be authorized to represent any participant in any matter before any agency at any time. Agencies would be

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31 COMMISSION ON ORGANIZATION OF GOVERNMENT, REPORT ON LEGAL SERVICES AND PROCEDURE 31 *et seq.* (1955).

32 TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURE, COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT 41 *et seq.* (1955).

33 That the A.B.A. Special Committee on Legal Services and Procedure was greatly influenced by the work of the Hoover Commission is demonstrated by a comparison of the Commission's recommendations *op. cit. supra* note 31, at 21-28. with title IV of S. 932. Identical to S. 932 are H.R. 3349, H.R. 3350, and H.R. 7006.

34 *Supra* note 33.

required to recognize and directly deal with any such attorney who is acting in a representative capacity.

General rules as to conflict of interest and general standards of conduct for all representatives are prescribed. The agencies would be directed to establish and enforce standards of conduct for non-attorney representatives. An agency order revoking or suspending the privilege of representation of a non-attorney would be reviewable in the United States district court in a trial de novo.

The United States Court of Appeals for the District of Columbia Circuit would prescribe special canons of ethics governing the practice of attorneys before the agencies. A federal grievance committee would be established for the purpose of receiving and investigating complaints against attorneys arising out of their practice before the agencies. The committee would be authorized to institute disciplinary proceedings against an attorney in the United States district court for the judicial district in which he is principally engaged in the practice of law and that court would have jurisdiction to reprimand, to suspend indefinitely or to enjoin permanently such attorney from practice before all agencies.

SECTION 402—RIGHT TO REPRESENTATION

In asserting the right to legal representation before any agency in any matter S. 932 may extend that right beyond present limits so as to include representation before each civilian and military department in the executive branch of the Government and any board, commission, authority or independent establishment, including corporations of the Government.[35]

Under the provisions of the Administrative Procedure Act,[36] "any person compelled to appear in person before any agency or representative thereof shall be accorded the right to be accompanied, represented, and advised by counsel" and "every party shall be accorded the right to appear in person or by or with counsel . . . in any agency proceeding." But the Administrative Procedure Act does not apply to the agencies or functions excepted in section 2(a) of that act,[37] nor to any proceedings specifically exempted by other statutes.[38]

Absent a regulation or statute, the right to counsel in an administrative proceeding usually must depend upon the due process clause of the Federal Constitution, and the question is usually reached by courts only after it appears that an administrative hearing is necessary.[39]

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[35] See definition of "Agency"—S. 932 §501.

[36] Administrative Procedure Act, 60 STAT. 240 (1946), 5 U.S.C. §1005(a) (1952).

[37] STAT. 237 (1946), 5 U.S.C. §1001(a) (1952); see also scope of application of 60 STAT. 238-239 (1946), 5 U.S.C. §§1003(a), 1004 (1952).

[38] See *e.g.,* Proceedings for the Deportation or Exclusion of Aliens, 66 STAT. 200, 8 U.S.C. §1226(a) (1952).

[39] Note, *Representation by Counsel in Administrative Proceedings,* 58 COL. L. REV. 395 (1958).

However desirable the right to legal representation may appear to be when considered in the abstract, it seems doubtful that legal representation as of right should become universally applicable. The Hoover Commission certainly did not so propose. In its recommendation number twenty-one, that Commission recognized as exceptions to the right of representation the classification of registrants by local selective service boards and the granting of voluntary benefits by the Government.[40]

Since legal representation generally is available in administrative proceedings, before enacting a blanket assertion of the right to representation, it seems preferable to determine on a case-to-case basis whether present exceptions to the general practice should be altered.

CENTRAL REGISTRATION OF ATTORNEYS

Under section 405 of S. 932 each representative who is a lawyer would be required to file with the Office of Federal Administrative Practice a certificate showing membership in good standing of the bar of the highest court of a state, territory, commonwealth, or possession of the United States or of the District of Columbia. Under section 406 of the bill the lawyer who has on file such a certificate may represent any participant in any matter before any agency. Agencies would be required to recognize such lawyers. Thus, the bill would create a centralized system of registration for lawyers. It is suggested that such registration is neither necessary nor desirable.

For years formal admission procedures have been under attack as being neither justified, efficient, nor economical,[41] and, in fact, within the year prior to May 1958, six agencies dispensed with formal admission procedures for lawyers,[42] so that today only four agencies[43] formally admit and maintain rosters of lawyers.

The expense of formally admitting and registering lawyers is not inconsiderable. The Hoover Commission stated that "at least $300,000 a year could be saved by the Treasury Department" alone by eliminating certain of its admission procedures for lawyers.[44] Approximately $10,000 is spent annually to qualify and enroll attorneys and agents for practice before the Patent Office.[45] The Veterans' Administration and the Interstate Commerce Commission, undoubtedly, spend

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[40] *Supra* note 31. However, the Task Force, citing restrictions on representation before the Internal Revenue Service, the Code of Indian Tribal Offenses, and the Selective Service System, recommended removal of all such restrictions. TASK FORCE REPORT, *op. cit. supra* note 32, at 287-288.

[41] OFFICE OF LEGAL COUNSEL DEP'T OF JUSTICE, ADMISSION OF ATTORNEYS TO PRACTICE BEFORE FEDERAL ADMINISTRATIVE AGENCIES — AN ANALYSIS AND RECOMMENDATION (1957); 9 AD. L. BULL. 152 (1957).

[42] These are: Department of Justice, Post Office Dep't, General Accounting Office, Subversive Activities Control Bd., Federal Communications Comm'n and Civil Service Comm'n.

[43] *Supra* note 3.

[44] HOOVER COMMISSION, *op. cit. supra* note 31, at 40.

[45] TASK FORCE REPORT, *op. cit. supra* note 32, at 306.

some money in administering enrollment programs.[46]

There are more than 200,000 lawyers in the United States today. New lawyers come out of law schools each year. Some die. Some leave the practice for other pursuits. The receipt, filing, and revision of certificates and the maintenance of currently accurate lists of lawyers will involve expenditure of considerable time and money. If only fifty percent of the lawyers at some time have occasion to be admitted to the administrative bar, we may be assured that processing of their certificates will cost the Government a tidy sum, which should be expended only if justified in terms of public benefit.

As an alternative to certification for lawyers it seems feasible simply to provide that any lawyer in good standing may practice before agencies of the Government.[47] Such is the approach taken by H.R. 261, H.R. 276, and H.R. 9144 now pending before the Eighty-fifth Congress.

It is the approach taken by the Office of Administrative Procedure, which would provide also that when an individual acting in a representative capacity appears in person or signs a paper in practice before an agency, his personal appearance or signature shall constitute a representation that he is, under applicable rules and law, authorized and qualified to represent.[48]

If it be argued that filing of a certificate is necessary to give the proposed Office of Federal Administrative Practice or the grievance committee jurisdiction for disciplinary purposes, it is, perhaps, sufficient to reply that jurisdiction can be predicated upon the act of practicing as well as upon the filing of a certificate of qualification.

There is nothing novel in this approach. There are, for example, the non-resident motorist statutes which sometimes predicate consent to be sued upon use of the public highways, and we have, among others, statutes which read into various acts of "doing business" within a state consent to state jurisdiction.

Section 407—Recognition of Lawyers

Not only would S. 932 require agency recognition of certificated lawyers generally, but also section 407 of the bill specifically would require service upon known lawyer representatives of all notices or other written communications required or permitted to be served upon the principal.

This provision would implement an October 1956 resolution of the Board of Governors, American Bar Association, recommended by

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[46] The Interstate Commerce Commission charges a fee of $10 for application for admission to practice and issues a certificate to those admitted. 49 C.F.R. §1.11 (1949).

[47] Exceptions may, of course, be made for any special needs of the four agencies which formally admit lawyers.

[48] *Supra* note 44. The Department of Interior has such a rule. 43 C.F.R. §1.6 (1954).

the Section on Administrative Law,[49] which expressed the belief that some agencies fail to notice or serve attorneys, thereby impairing the fundamental right of persons to be effectively represented by counsel and defeating rights or prejudicing persons in their dealings with the Government.

While it is the practice of most agencies to serve notices and other pleadings upon counsel, agency rules on the subject are by no means uniformly adequate and occasionally principals may suffer delay and inconvenience, if not loss of valuable rights, because of failure to serve counsel. One such case has come to the attention of the writer within the past year, and some few others may be documented.[50]

The Office of Administrative Procedure, in cooperation with members of the District of Columbia Bar, the Federal Bar Association, and the American Bar Association Committee on Representation, has drafted and proposed for agency adoption a rule similar in language to that of section 407. It reads:

> When any participant in any matter before [name of agency] is represented by an attorney-at-law and that fact has been made known in writing to the agency, any notice or other written communication required or permitted to be given to or by such participant shall be given to or by such attorney. Where any other method of service is specifically provided by statute, service shall also be made as so provided. If a participant is represented by more than one attorney, service by or upon any one of such attorneys shall be sufficient.

Either more extensive use of the suggested rule or enactment of section 407 of the bill would appear to result in general improvement of present practice.

Discipline of Representatives

The standards of conduct to be imposed upon all representatives by section 403 of S. 932 and the rules as to conflict-of-interest provided by section 409 are in accord with commonly accepted principles of conduct, and thus raise no major problems.

Discipline of non-lawyers is left with the agencies substantially as at present. However, lawyer representatives would be subjected to new and different treatment. They would be subject to special canons of ethics to be promulgated by the United States Court of Appeals for the District of Columbia (section 405) and policed by a grievance committee, to be appointed by the chief judge of that court.

The agencies, apparently, would no longer have authority to discipline lawyers. Instead, disciplinary proceedings would be in the United

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[49] 9 Ad L. Bull. 259 (1957).

[50] See account of 1951 incident involving alleged failure of the Veterans' Administration to reply to attorney for "ignorant, Negro woman" who claimed benefits under policies of War Risk Insurance, vom Baur, *op. cit. supra* note 8, at 23.

States district courts in the districts in which respondents principally engage in the practice of law.

It was felt by the Hoover Commission and its Task Force that disciplinary action against lawyers in administrative practice should be taken in the district courts. As the Commission put it—

> Some attorneys engaged in practice before Federal agencies may escape disciplinary action by a State court for unprofessional conduct before such agencies because of their absence from the jurisdiction of the State. An attorney, active in Federal administrative practice, who moves to Washington, D. C., may retain only formal ties with his State jurisdiction. He must, of course, remain a member of the State bar if he is to continue representation of others as an attorney. Disbarment proceedings may not be available against him in the District of Columbia if he has not meanwhile become a member of the Bar of the District.
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> Authority to discipline an attorney in Federal administrative practice should be vested in the United States district court of the judicial district in which he principally engages in the general practice of law. Thus, a lawyer practicing in Pennsylvania who intermittently appears before agencies in Washington, D. C., would be disciplined by the Federal district court in Pennsylvania. The Pennsylvania lawyer who moved to Washington, D. C., permanently would be disciplined by the United States Court for the District of Columbia.[51]

Both the Commission and its Task Force would have policed the practice of administrative law by a federal grievance committee, but both would have left some disciplinary authority in the agencies. The Task Force felt that since the agencies have a primary responsibility for proper conduct and fair proceedings, they should be able to deal promptly and effectively with contumacious lawyer representatives. Accordingly, the Task Force would have authorized agencies to suspend lawyers for a period of not more than one year.[52] The Commission generally agreed.[53]

It is believed that the position of the Hoover Commission in this respect is sound, and that, at a minimum, the agencies should have authority to suspend pending consideration by the grievance committee and until a court may pass upon the questions involved either by interlocutory or final order.

The federal grievance committee to be created by adoption of S. 932 would require some assistance. It would need some "housekeeping" facilities, clerical and stenographic assistance, and assistance in investi-

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[51] HOOVER COMMISSION REPORT, *op. cit. supra* note 31, at 38. See also TASK FORCE REPORT, *op. cit. supra* note 32, at 308-309.

[52] TASK FORCE REPORT, *op. cit. supra* note 32, at 309.

[53] HOOVER COMMISSION REPORT, *op. cit. supra* note 31, at 40 (Recommendation No. 26).

gating complaints. Under S. 932 all such assistance would be rendered by the director of an independent office. The director would also maintain the lists of attorneys and process the certificates (which may not be needed). The director, under other titles of S. 932, would administer the legal career service and the hearing examiner program, and would also have responsibility under title I for various functions in connection with agency procedures.

Admittedly, the title IV functions can be performed by an agency which also has the other duties to be imposed upon the director. But is there any substantial relationship between title IV on the one hand and titles I, II, and III on the other? Stated otherwise, is there in administration of title IV any substantial role for a director?

Both the Task Force and the Hoover Commission, apparently, contemplated that the grievance committee should receive its assistance from the Department of Justice—a department of lawyers, with established housekeeping, clerical, and investigatory facilities available.[54]

It is suggested that the title IV functions of the director should be placed with the Department of Justice, as was recommended by the Task Force and the Commission.

SENATE BILL 932 AND THE "PRACTICE OF LAW"

While section 402 of S. 932 would permit participants in certain proceedings to be represented by non-lawyers, sections 409 and 410 would prohibit the practice of law by any representative who is not a lawyer. In confining representation by non-lawyers to those cases which do not involve the practice of law the bill may impose upon agencies the extremely difficult task of determining, in the first instance, what is the practice of law?

To be sure, the agencies may now have that responsibility, but the bill offers little to guide agencies in prescribing the scope of practice by non-lawyers.

Admittedly, determining precisely what is the practice of law is not easy. One has but to examine any recent issue of the American Bar Association's publication, *Unauthorized Practice News*, to become aware of the difficulty of making determinations in specific cases. Any such determination is rendered more difficult by the variety of criteria employed. Shall any given act of alleged practice be judged by the "matters connected with the law" test,[55] the "strict legal instrument" test,[56] the famous "Bercu" test,[57] or some other test?[58] It seems doubtful

[54] TASK FORCE REPORT, *op. cit. supra* note 32, at 48 (part I), 309 (part IV), HOOVER COMMISSION REPORT, *op. cit. supra* note 31, at 39.

[55] *In re* Duncan, 83 S.C. 186, 65 S.E. 210 (1909).

[56] Annot., 111 A.L.R. 22 and cases cited therein.

[57] *In re* Bercu, 273 App. Div. 524, 78 N.Y.S.2d 209 (1948).

[58] Clark, *Accountants in Treasury Practice: The Department Regulations Should Adopt the Bercu Rule*, 24 GEO. WASH. L. REV. 377 (1956); Comment, 35 MARQ. L. REV. 370 (1952); Comment, 28 SO. CALIF. L. REV. 303 (1955).

in the extreme that in this field, where courts and lawyers have not agreed upon criteria, administrators can successfully establish adequate standards.

Moreover, if S. 932 be deemed express authority for agencies to determine what is the practice of law, rather serious questions in the field of federal-state relationships are presented. Some constitutional questions undoubtedly would arise from agency authorization of activity, which, if engaged in by a non-lawyer, would constitute the practice of law in violation of state law.[59]

But, even though federal supremacy be assumed,[60] it nevertheless may be considered desirable to leave regulation of the practice of law largely with state authorities. In the words of the Task Force—

> The Federal Government should not interfere with the traditional control by the States of the practice of law or with the States' definition of that concept unless the consequence of State action is to completely defeat the effective functioning of Federal agencies.[61]

Somewhat paradoxically the advocates of S. 932, who rely so heavily upon the Hoover Commission and its Task Force, would centralize admission to the administrative bar and control of the practice of administrative law in two central agencies—the proposed Office of Federal Administrative Practice and the proposed grievance committee—both of which would operate under authority of the federal government.

While the need for improved policing probably merits establishment of a grievance committee authorized to institute disciplinary proceedings in the courts, which would have ultimate disciplinary control in individual cases, it is doubtful that any comparable need can be shown for centralized admission to the administrative bar.

S. 932 does propose one significant specific limitation upon the practice of law in that by a proviso to section 402 "no party to an agency hearing required under the Constitution or by statute to be determined on a record which is subject to judicial review shall be represented except by an attorney at law."[62]

The privilege of representation before federal agencies, of course, cannot be limited to any one group or profession. The engineer, the accountant, the traffic expert, the economist, and others all possess skills

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[59] U.S. CONST. amend. X; Agran v. Shapiro, 127 Adv. Cal. App. 129, 273 P.2d 619 (1954). *But see* U.S. CONST. art. I, §8; Goldsmith v. Board Tax Appeals, 270 U.S. 117 (1925). "Let it be remembered, also,—for just now we may be in some danger of forgetting it,—that questions of jurisdiction were questions of power as between the United States and the several States." 2 MEMOIR OF CURTIS 340-341, as cited by Mr. Justice Frankfurter, dissenting, in Konigsberg v. State Bar of California 353 U.S. 252, 274 (1957).

[60] Clark, *supra* note 58.

[61] TASK FORCE REPORT, *op. cit. supra* note 32, at 290.

[62] Probably the words "at the hearing" should be inserted in the proviso after the word "represented."

TABLE I

PROVISIONS OF AGENCY RULES ON DISBARMENT OF ATTORNEYS*

Agency	Suspension may be summary	Grounds for disbarment					Prerequisite to disbarment	
		"Good cause," "unfit," or in agency discretion	Violation of standards of conduct of courts	Violation of stated rules	Disbarment by courts	Disbarment by other administrative agencies	Notice to be given	Hearing afforded
Department of Agriculture								
Agricultural Marketing Service (1)	x			x			x	x
Commodity Exchange Authority (2)			x				x	x
Packers and Stockyards Act (3)			x				x	x
Department of Commerce								
Bureau of Foreign Commerce (4)				x			x	x
Civil Aeronautics Administration (5)		x						x
Civil Aeronautics Board (6)		x						x
Patent Office (7)			x				x	x
Department of HEW								
FSA—Employee Comp. Appeal Bd. (8)				x			x	x
Department of the Interior (9)				x	x	x	x	x
Department of Justice								
Board of Immigration Appeals (10)				x	x	x	x	x
Immigration & Naturalization Service (10)				x	x	x	x	x
Department of Labor								
Deputy Commissioner (11)		x						x
Federal Coal Mine Safety Bd. of Review (12)	x			x				x
Federal Communications Commission (13)			x					x
Federal Deposit Insurance Corp. (14)	x	x						x
Federal Maritime Board (15)		x						x
Federal Power Commission (16)	x			x				x
Federal Reserve Board (17)	x	x						x
Foreign Claims Settlement Commission (18)	x			x				x
General Accounting Office (19)				x			x	x
Indian Claims Commission (20)	x				x		x	
Interstate Commerce Commission (21)		x						x
National Labor Relations Board (22)	x	(23)					x	x
Post Office Department (24)				x	x	x	x	x
Securities and Exchange Commission (25)	x			x				x
Subversive Activities Control Board (26)	x			x				
Treasury Department (27)				x			x	x
U.S. Tariff Commission (28)		x						x
Veterans Administration (29)	x			x			x	

(1) 7 CFR §900.60(b)(2) and 7 CFR §47.32(b)(2)
(2) 17 CFR §0.11(c)(1)
(3) 9 CFR §202.11(c)(1)
(4) 15 CFR §384.2
(5) 14 CFR §406.47
(6) 14 CFR §302.11(a)
(7) 37 CFR §1.344, .348
(8) 20 CFR §403.713(f)
(9) 43 CFR §1.7
(10) 8 CFR §292.6, .61
(11) 20 CFR §31.21
(12) 30 CFR §401.8(f)
(13) 47 CFR §1.24
(14) 12 CFR §308.2(b)
(15) 46 CFR§201.29
(16) 14 CFR §1.4
(17) 12 CFR §263.1(b)
(18) 45 CFR §500.5
(19) 4 CFR §1.5
(20) 25 CFR §503.38
(21) 49 CFR §1.13
(22) 29 CFR §102.44
(23) "[M]isconduct [at any hearing before a trial examiner or before the Board] of an aggravated character, when engaged in by an attorney or other representative of a party, shall be ground for suspension or disbarment. . . ."
29 CFR §102.44(b)
(24) 39 CFR §§202.5, 202.20 - .41
(25) 17 CFR §201.2
(26) 28 CFR §201.5(c)
(27) 31 CFR §10.7
(28) 19 CFR §201.12(c)
(29) 38 CFR §14.635

*Reprinted from OFFICE OF ADMINISTRATIVE PROCEDURE, DEP'T OF JUSTICE, ANN. REP. (1957).

needed for proper implementation of the vast power of the regulatory agencies. But these non-lawyer groups cannot be expected to possess the panoramic view of substantive and procedural law requisite to successful conduct of adversary trial proceedings. Such proceedings are quasi-judicial in character, and they are inherently comparable to litigation in the courts. Practice in them is in every sense the practice of law and should be limited to lawyers.

Some other drafting problems, mostly minor in nature, are presented by title IV of S. 932. Essentially however, and despite the criticisms herein set forth, the title has merit and deserves the serious consideration of those who are interested in protection of the public from the evils brought about by those who assume to represent others without proper qualifications.